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IN THE UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF ARIZONA

United States of America, Plaintiff, v. Gear Box Z, Inc. Defendant.	No. CV-20-08003-PHX-JJT **THE UNITED STATES' REPLY IN SUPPORT OF MOTION FOR PRELIMARY INJUNCTION**

INTRODUCTION

The United States demonstrated in its opening brief that Gear Box Z, Inc. ("GBZ") is violating the Clean Air Act ("CAA") by selling its defeat device products and that, absent an injunction, its products will continue to cause excess emissions to be generated and irreparable harm to human health and the environment. The United States further established that it is entitled to injunctive

relief because the four requisite factors to award an injunction weigh decisively in its favor.

In its opposition, GBZ tries to obfuscate the issues by arguing that it might meet certain CAA exceptions, but without explaining, let alone providing evidence, how the exemptions apply to the products GBZ is selling. They do not. Some of the exceptions it cites are plainly inapplicable to aftermarket retailers such as GBZ. Others do not actually exist. And the one exemption that theoretically could apply to GBZ has detailed requirements that GBZ does not even claim to meet.

GBZ also fails to dispute the United States' arguments about the actual functionality, use, and effect of GBZ's defeat devices, including those proffered by the United States' software expert and environmental harm expert. Additionally, GBZ fails to overcome the United States' showing of irreparable harm caused by GBZ's products, including: (1) that its products defeat emission controls in motor vehicles; (2) that its products cause excess emissions; and (3) that excess air pollution causes irreparable harm to human health and the environment. Instead, GBZ admits that its products defeat emission controls, but contends that its potential financial harm from a preliminary injunction outweighs irreparable harm to human health and the environment. This argument fails.

GBZ has failed to meet its burden of demonstrating that its products are not illegal defeat devices and does not present any reason why this Court should

not enjoin GBZ from selling its defeat device products. Accordingly, this Court should grant the United States' Motion for Preliminary Injunction.

ARGUMENT

I. The United States Has Shown Probable Success on the Merits

A. The CAA Exemptions GBZ Cites Do Not Apply to Any of GBZ's Products

GBZ bases its entire argument against the United States' demonstration of success on the merits on the fallacious claim that sales of all of its defeat device products are exempt from the defeat device prohibition in Section 203 of the CAA. None of the exemptions apply here. Some of the exemptions apply only to vehicle manufacturers as opposed to parts manufacturers like GBZ. Others have specific requirements that GBZ does not even claim to satisfy, and cannot. And one is a fabricated exemption that is inapplicable to parts intended for motor vehicles.

As a preliminary matter, the burden of proof applicable to an exemption lies with GBZ, notwithstanding the United States' general burden of proof for a preliminary injunction. *See United States. v. First City Nat'l Bank of Houston*, 386 U.S. 361, 366 (1967) (general rule is that the party claiming the benefits of an exemption to the prohibition of a statute has the burden of proving it meets the exemption); *see also NLRB v. Ky. River Comm. Care, Inc.*, 532 U.S. 706, 711 (2001); *EEOC v. Kamehameha Schools/Bishop Estate*, 990 F.2d 458, 459 (9th Cir. 1993) (the Ninth Circuit has agreed that the burden of proof on statutory

exceptions falls on the party seeking to reap the benefits of the exception); *Anderson v. Farmland Indus., Inc.*, 70 F. Supp. 2d 1218, 1226 (D. Kan. 1999) (placing the burden of proof on the party claiming the exemption is consistent with how courts have treated other statutory exemptions in the CAA). The burden now shifts to GBZ to prove that it can satisfy every element of each exemption it claims. In its opposition, GBZ does not even claim to meet all of the requirements in the maintenance exemption, let alone demonstrate that it meets any of the other claimed exemptions. Thus, none of the CAA exemptions are applicable here and the United States is likely to succeed on the merits.

1. GBZ Has Not Established that its Defeat Devices Fall within the CAA "Maintenance" Exemption to Section 203

GBZ argues that its defeat device products are exempt from the prohibition in Section 203 because they are used for "maintenance." ECF No. 42 at 6. GBZ claims that it can avail itself of this exemption because its products are used for a "temporary procedure" for maintenance and are fully "reversible." *Id.* Even if true, "reversibility" is not a defense to a claim under the CAA. Section 203 states that an action (i.e. use of a defeat device product) is not prohibited if "(i) the action is **for the purpose of** repair or replacement of the [emissions-related] device or element, or is a **necessary and temporary** procedure to repair or replace any other item and the [emissions-related] **device or element is replaced upon completion of the procedure**, and (ii) such action **thereafter results** in the proper functioning

of the device or element referred to in paragraph (3)." 42 U.S.C. § 7522 (emphasis added). The very text of Section 203 itself precludes GBZ's argument because GBZ does not claim that the use of its products are "necessary" to any repair or that its products actually restore the vehicles' original equipment manufacturer ("OEM") emission controls to their proper functioning.

First, the exemption applies to use of the product for "necessary and temporary" repair procedures. 42 U.S.C. § 7522(a)(5). GBZ makes no such showing, completely ignoring this element of the exemption, and makes no effort to even argue that there is a *legitimate* maintenance purpose, much less a *necessary* procedure, for the use of its products.

Second, the maintenance exemption does not merely require "reversibility" of the changes resulting from the use of its products, as GBZ argues, but that the changes must actually be reversed, and proper functioning of the device or elements repaired are replaced and restored. *Id.* GBZ contends that the exemption applies because its products *are capable of* being fully reversed to the original or proper functioning of the device or element of design after the maintenance or repair procedure is complete. ECF No. 42 at 6. To apply GBZ's interpretation of the exemption would swallow the defeat device prohibition because it is technically possible to reverse *any* effect or installation of a defeat device. *See Cuomo v. Clearing House Ass'n, LLC*, 557 U.S. 519, 530 (2009) (exemptions are narrowly construed so that they do not "swallow the rule."); *United States v. Luna*,

768 F. Supp. 705, 708 (N.D. Cal. 1991) (statutory exceptions are to be strictly construed so as to prevent the exception from swallowing the rule).

A survey of GBZ's brief and supporting declaration demonstrates they are wholly devoid of *any claim* that the changes its products make are routinely, or ever, reversed. Rather, GBZ makes conclusory statements that "once completion of the maintenance procedure the motor vehicle's emission system operates according to the OEM's design," and that GBZ's "Tunes changes the vehicle's computer output as part of maintenance procedures and ALL changes are temporary." ECF No. 42 at 7-8; ECF No. 42-1, Black Decl. ¶¶ 22, 33. But GBZ does not claim that such changes are ever in fact reversed. *Id.* Nor does GBZ provide evidence of a single instance of its parts actually being used for repair purposes and the vehicle thereafter returned to its prior configuration. For example, GBZ could have, but does not provide a single declaration from a customer attesting to such reversals.

GBZ's claim that its products are fully reversible only means that GBZ's software products are capable of allowing the end user to undo all of the delete tuning of the emission controls and return the vehicle back to its original equipment manufacturer ("OEM") condition. ECF No. 37-2, Jones Decl. ¶¶ 88–89. Notably, GBZ could have, but does not claim to have, designed the software to automatically perform the "fully reversible" feature GBZ touts as its defense. Instead, to "reverse" GBZ's software alterations, once they are made, requires an

affirmative act by the end user to manually uninstall them. In reality, this is a tedious task that requires removing all of the emulators and reconnecting all of the original emissions controls (such as the DOC and DPF) and sensors so that the vehicle operates properly. *Id.* ¶¶ 89, 140. It is therefore understandable why GBZ never claims that its customers actually reverse the changes they make to emissions controls.

In its opposition brief, GBZ asserts that its hardware products such as the DPF Emulator, Block Plates, and Exhaust Pipes, are to be used in conjunction with other parts in order to achieve the intended maintenance and repair of the vehicle and are "only sold in maintenance kits to be used as part of a maintenance kit or maintenance tool." ECF No. 42-1, Black Decl. ¶¶ 13, 21, 24. Similarly, GBZ states that its Tunes are "part of a maintenance kit that allows for the temporary removal of emission related parts and then is removed upon completed of the procedure," which includes the Exhaust Pipes. ECF No. 42-1, Black Decl. ¶ 21. GBZ admits that that its products "must be used in conjunction with" other parts in order to achieve this temporary maintenance and repair purpose. *See* ECF No. 42 at 7; ECF No. 42-1, Black Decl. ¶ 19. This implies that sold alone, its products cannot affect "temporary" or "reversible" changes. However, GBZ clearly sells all of these parts separate and independent from any maintenance kit or exhaust system, and not as "'*add-on*' or '*plus*' portions[s] of the maintenance kit." *Id.*

Black Decl. ¶ 31.[1] For example, on its website GBZ offers the option to purchase the DPF Emulator with either "No Exhaust," or a variety of "DELETE RACE EXHAUST[S]."[2] The Exhaust Pipes are explicitly labeled as "Additional Options" for purchase with the DPF Emulators.[3] Thus, while GBZ recognizes that these products must be utilized in conjunction with each other in order to effectuate the temporary maintenance and repair procedures, they are explicitly advertised and sold as separate, independent components.

Finally, as the United States' software expert explains, the notion that GBZ's tuners are used for maintenance and repairs by maintenance shops or professionals is not credible. The OEMs' engineers design the engine control module ("ECM") with diagnostics information built into it for repair technicians. ECF No. 37-2, Jones Decl. ¶ 72. As such, a typical ECM is designed to generate thousands of different diagnostic trouble codes ("DTCs") so that the technician has in the OEM's ECM binary image all of the diagnostic information necessary to diagnose and fix any problems. *Id.* Thus, technicians never have to download tunes for maintenance and repairs or use third-party tuners, like GBZ's. *Id.* Authorized dealers for the OEMs also have no use for third-party tuners.

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[1] *See* https://gearboxz.com/collections/ford/products/gbz-fd40-gbz-ford-4-0-programmer; https://gearboxz.com/collections/tuners/products/duramax-4-0-programmer-gbz-gmd40; https://gearboxz.com/collections/tuners/products/electron-add-ons-gbz-em1-0.
[2] *See* https://gearboxz.com/collections/tuners/products/gbz-dd30-gbz-dodge-3-0-electronics.
[3] *Id.*

ECF No. 37-2, Jones Decl. ¶ 71. Specifically, they also have no need for third-party software for diagnostic purposes, and do not change the ECM or transmission control module programming using third-party tuners to bypass emission controls because doing so voids the OEM warranty. *Id.* Rather, they only use genuine OEM "parts" including OEM software. *Id.*

Furthermore, GBZ equates its tuners[4] to a "common DTC code reader" to argue that its tuners in no way defeat emission controls and do not disable the DTC system, and that its tuner simply "turns off certain codes temporarily for the maintenance procedure." ECF No. 42 at 11; ECF No. 42-1, Black Decl. ¶ 41. This is a false equivalent. Compare GBZ's tuners that average around $400 each and are designed to be used on one particular vehicle, to a common code reader that costs around $20, like the one GBZ cites in its brief, and can be used on an infinite number of vehicles. ECF No. 42 at 12. This alone demonstrates how incredible GBZ's claims are that its products are used only for maintenance to "turn off codes."

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[4] GBZ attempts to cloud the issues by taking issue with the United States reference to its products as "tuners" and denies that it manufacturers or sells "tuners." ECF No. 42 at 10. However, GBZ's product home page includes the word "tuners" in the URL. https://gearboxz.com/collections/tuners.

2. There is No Competition Use Exemption under the CAA

GBZ claims that its products are exempt because they may also be used solely for competition. ECF. No 42 at 15. Contrary to GBZ's assertion, there is no competition use exemption for motor vehicles under the CAA. *See* 40 C.F.R. § 85.1701. The CAA defines "motor vehicle" as "any self-propelled vehicle designed for transporting persons or property on a street or highway." CAA § 216(2); 42 U.S.C. § 7550(2); *see also* 40 C.F.R. § 85.1703 (further defining "motor vehicle"). The definition focuses on vehicle *design attributes* and not on their *use*, *i.e.*, "competition." *Id.* An EPA-certified motor vehicle does not somehow disappear from the jurisdiction of the CAA if it is used exclusively for competition motorsports. Likewise, aftermarket defeat devices remain subject to the CAA prohibition when they are manufactured and sold, or purportedly manufactured and sold, for motor vehicles that may be used exclusively for competition motorsports. The CAA lays out the exemptions in Section 203(b), and this includes no mention of competition exemption. 42 U.S.C. § 7522(b)

While there is a competition exemption for "nonroad vehicles," CAA regulations are explicit that this exemption does not apply to "motor vehicles,"

which are the very types of vehicles GBZ products are made for.[5] *See* 40 C.F.R. §§ 85.1701(a)(1); 1068.235. An EPA-certified motor vehicle cannot become a nonroad vehicle even if it is used exclusively for competition because the definition of motor vehicle hinges on the purpose of its design and not its use.

All of GBZ's products are advertised and designed for use on various makes and models of GM, Ford, and Dodge motor vehicles – all of which are EPA-certified motor vehicles. Therefore, even if GBZ claimed (which it does not) and could prove that its products are used exclusively on competition-only vehicles, those vehicles remain "motor vehicles" subject the CAA defeat device prohibition because they were designed for on-road use and EPA certified them as "motor vehicles." Thus, providing a competition use only disclaimer when selling defeat devices indiscriminately to the public-at-large provides GBZ with no legal protection. *See, e.g.*, *United States v. Gardner*, 860 F.2d 1391 (7th Cir. 1988) (a

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[5] EPA started regulating "nonroad vehicles" with the 1990 CAA amendments. This category includes, for example, agricultural equipment, construction equipment, locomotives, all-terrain vehicles and dirt bikes. After these amendments, the CAA essentially addressed three types of vehicles: "motor vehicles," "nonroad vehicles," and vehicles that the manufacturer intends to be used exclusively for competition (e.g. NASCAR). Accordingly, the CAA amendments defined nonroad vehicle as excluding motor vehicles and competition only vehicles. *See* 42 U.S.C. §§ 7550(11); 7550(10). In addition, EPA has promulgated and implemented regulations describing how to exempt nonroad vehicles from nonroad vehicle requirements if they used solely for competition and meet other requirements. *See* 40 C.F.R. § 1068.235. This provision explicitly states that it does not apply to "motor vehicles." *Id;* 85.1701(a)(1).

disclaimer does not negate a defendant's guilt; rather, the disclaimer establishes the fact that the defendant is well aware that his or her actions are unlawful).

3. GBZ's Other Cited Exemptions are Inapplicable

GBZ's claims that its products *may* be subject to other CAA exceptions namely exemptions for high altitude adjustments; export vehicles; vehicles used for research investigations, studies, demonstration, or training; vehicles for national defense; and emergency vehicles. ECF No. 42 at 15. These claims are completely meritless.

First, as with GBZ's claimed maintenance exemption, its invocation of other exemptions is totally hypothetical. It does not claim that a single one of its products actually fits within the terms of any cited exemption. GBZ also does not point to any evidence demonstrating that any of the exemptions apply here.

Moreover, many of these exemptions apply only to vehicle "manufacturers" and do not apply to aftermarket part manufacturers, like GBZ. *See* 42 U.S.C. § 7549(b) (high altitude performance adjustments apply to manufacturer instructions); 42 U.S.C. § 7550(3) (export exemption applies to manufacturers of "new motor vehicles" intended solely for export and must be labeled as such); 40 C.F.R. § 85.1716 (manufacturer can request modifications to emission controls on emergency vehicles to prevent interference in emergency response); 42 U.S.C. § 7522(b) (manufacturer exemptions under CAA). "Manufacturer" means "any person engaged in the manufacturing or assembling of new motor vehicles, new

motor vehicle engines, new nonroad vehicles or new nonroad engines." 42 U.S.C. § 7550(1). As an aftermarket product manufacturer and seller, GBZ does not meet this definition. Furthermore, GBZ's products are made to fit American (EPA-certified) vehicles, undermining any claim they are intended for export.

Similarly, GBZ's claimed exemptions for research, investigation, and studies, and motor vehicles owned by a federal agency responsible for national defense also fail. There are explicit statutory and/or regulatory requirements to meet these exemptions, which GBZ has not demonstrated. To qualify for the research, investigations, studies, or demonstrations exemption, "non-certificate holders" (*i.e.*, non OEMs) must request an exemption, perform certain steps to demonstrate applicability of exemption, and affix permanent labeling to all exempted engines/equipment. *See* 40 C.F.R. §§ 1068.210(d)(1)-(5) (requirements to obtain testing exemption); and (e)(3) (permanent labeling requirements). The national defense exemption only applies to engines and to qualify requires meeting specific criteria such as that an engine is installed in equipment that has "armor, permanently attached weaponry, or other substantial features typical of military combat." *See* 40 C.F.R. § 1068.225(a)(1); *see also* (e) (permanent labeling requirements to all engines and equipment exempted under this section). Thus, these exceptions are irrelevant to facts of this case and do not undermine the United States' position that GBZ's products are illegal defeat devices under the CAA.

B. GBZ Misinterprets the Knowledge Element Under CAA § 203(a)(3)(B)

GBZ contends that it is "not liable for the unlawful use of its products" because it has no control over end users, and EPA should instead pursue the end users for violations. ECF No. 42 at 14-15. The authority GBZ relies on for this defense was overturned by the Supreme Court on the issue for which GBZ cites it. *See MGM Studios, Inc. v. Grokster, Ltd.*, 545 U.S. 913, 936-37 (2005) ("One who distributes a device with the object of promoting its use to [violate a law], as shown by clear expression or other affirmative steps taken to foster infringement, is liable for the resulting acts of infringement by third parties"). More importantly, this is not the correct standard under the statute.

Section 203 of the CAA does not base liability on whether an automotive equipment distributor had control over the illegal use of its products, but rather whether the distributor "knows or should know" that the products are being offered for sale or installed to bypass, defeat, or render inoperative the emissions controls of a motor vehicle. 42 U.S.C. § 7522(a)(3)(B). Thus, United States' burden is simply to show that there is a sale or offer for sale of a "part or component intended for use with a motor vehicle . . . where a principal effect of the part or component is to bypass, defeat, or render inoperative any device or element of design installed in a motor vehicle . . . and where the person knows or

should know that such part or component is being offered for sale or installed for such use or put to such use." 42 U.S.C. § 7522(a)(3)(B).

All of GBZ's products are made for and intended for use on EPA-certified motor vehicles, i.e. Ford, GM, and Dodge – all of which are motor vehicles under the CAA as they have been certified for on-road use. GBZ manufactured many of the products that are the subject of this lawsuit—including the delete components—and therefore "knows or should know" that the products are being offered for sale or installed to bypass, defeat, or render inoperative the emissions controls of a motor vehicle. 42 U.S.C. § 7522(a)(3)(B). GBZ's product manuals, advertisements, and statements in customer Q&A's, corroborate this. ECF 37-1 at 27; ECF No. 37-3, Jorquera Decl. ¶¶ 49-52; ECF. No. 37-2, Galer Decl. ¶ 19.

Lastly, GBZ argues that additional discovery is needed to resolve these factual disputes before a preliminary injunction is issued. Yet, it is GBZ that has custody and control over any potentially relevant evidence and every document needed to demonstrate any exceptions apply. GBZ has failed to claim critical facts let alone provide any evidence to support its claimed exemptions or state what additional evidence it would seek from the United States to support its claims.

II. The United States Demonstrated Irreparable Harm from GBZ's Activities

As explained in the United States' opening brief, the Court can presume irreparable harm here because the United States is bringing a statutory

enforcement action that authorizes injunctive relief. *See FTC v. Consumer Def., LLC*, 926 F.3d 1208, 1213 (9th Cir. 2019). The United States did not rest on this presumption in seeking preliminary relief, however, and also demonstrated that the excess air pollution causes irreparable harm, such as increased medication use, emergency room visits, hospitalizations, and in some cases, premature death, especially for vulnerable groups such as the elderly, children, outdoor workers, and those with heart or lung disease. ECF No. 37 at 35–37.

The United States demonstrated the amount of excess emissions GBZ's products cause motor vehicles to generate and the irreparable harm this will have on human health and the environment in the absence of preliminary relief. ECF No. 37 at 32–34. Because GBZ has not met its burden of demonstrating that its products are exempted under the CAA, these products are illegal defeat devices and the emission calculations are an accurate tally of the harm caused by them.

GBZ does not refute that its products will cause irreparable harm to human health and the environment. Instead, GBZ argues that the timing of the United States' motion is grounds for denial. However, courts have repeatedly found that delay is not sufficient grounds for denial. *McDermott ex rel. NLRB v. Ampersand Pub., LLC*, 593 F.3d 950, 965 (9th Cir. 2010); *Aguayo ex rel. NLRB v. Tomco Carburetor Co.*, 853 F.2d 744, 750 (9th Cir. 1988) ("Delay by itself is not a determinative factor in whether the grant of interim relief is just and proper."). "Usually, delay is but a single factor to consider in evaluating irreparable injury";

indeed, "courts are loath to withhold relief **solely on that ground**." *Arc of Cal. v. Douglas*, 757 F.3d 975 (9th Cir. 2014) (emphasis added) (quoting *Lydo Enters., Inc. v. City of Las Vegas*, 745 F.2d 1211, 1214 (9th Cir. 1984)); *see also Gordon v. Holder* 632 F.3d 722, 724 (D.C. Cir. 2011) ("A delay in filing is not a proper basis for denial of a preliminary injunction."). Moreover, in instances such as continuous generation of excess air pollution that will have long lasting and permanent impacts, "tardiness is not particularly probative in the context of ongoing, worsening, injuries." *Douglas*, 757 F.3d at 990.

The cases that GBZ cites involved unreasonable delay – and are thus distinguishable from this case. *Benisek v. Lamone*, is a gerrymandering case where the plaintiff moved for a preliminary injunction six years, and three general elections, after the 2011 map at issue was adopted, and three years after the first complaint was filed. 138 S. Ct. 1942, 1944, 201 L. Ed. 2d 398 (2018). Similarly, *Oakland Tribune, Inc. v. Chronicle Publishing Co., Inc.*, is an antitrust case between two newspaper publications where the plaintiff intentionally delayed filing the preliminary injunction for a number of years. 762 F.2d 1374, 1377 (9th Cir. 1985). In those cases the courts were dealing with delays of years, and for reasons that were within the plaintiffs' control.

Conversely, the facts here are dissimilar as any "delay" here is defensible and reasonable. First, the United States filed its motion months, not years, after the lawsuit was filed. Filing a preliminary injunction less than eight months after

the complaint does not impact the importance of the request for an injunction. *See Native Ecosystems Council v. Marten*, 334 F. Supp. 3d 1124 (D. Mont. 2018) (finding that a ten-month delay should not impact the efficacy of the plaintiff's request for a preliminary injunction). Second, GBZ neglects to mention that during this time of "delay," prior to filing the Complaint, the parties were discussing potential settlement. About one year after settlement negotiations failed, the United States filed the Complaint. ECF No. 1; ECF No. 42-1, Galer Decl. ¶ 28. Thus, GBZ's account of the delay dating back to EPA's issuance of the Notice of Violation at the end of 2017 fails to accurately portray the circumstances, which do not constitute unreasonable delay.

Consequently, the fact that the United States is seeking an injunction now, and not in the first instance, does not undermine the demonstration that irreparable harm will result absent injunctive relief. An injunction will prevent additional GBZ defeat devices from entering the market and increasing emissions because each deleted vehicle generates a significant amount of excess emissions. ECF No. 37 at 32–34. EPA's emission calculations show that before trial concludes, if GBZ continues to sell its defeat device products at its previous rate, each month GBZ continues to sell defeat devices will result in 132 excess tons of NO_x alone over the remaining life of the altered vehicles. *Id.* at 5. Thus, multiplying this figure by the number of months until trial concludes equals a significant amount of excess harmful air pollution, which no remedy will be able to remove from the

atmosphere. In the absence of any rebuttal to the United States' showing of harm, the Court should find irreparable harm here.

III. The Balance of Equities and Public Interests Favors an Injunction

In a situation such as this, where the United States has demonstrated likely success on the merits and irreparable harm, an injunction altering the status quo is appropriate. "If the currently existing status quo itself is causing one of the parties irreparable injury, it is necessary to alter the situation so as to prevent the injury." *Or. State Pub. Interest Research Grp. v. Pac. Coast Seafoods Co.* 374 F. Supp. 2d 902, 907 (D. Or. 2005) (quoting *Canal Auth. of Fla. v. Callaway*, 489 F.2d 567, 576 (5th Cir. 1974). "The focus always must be on prevention of injury by a proper order, not merely on preservation of the status quo." *Id.* Also, when a preliminary injunction will stop illegal behavior, changing the status quo is the objective. *Frankl ex. Rel. NLRB v. HTH Corp.,* 650 F.3d 1334, 1341 (9th Cir. 2011) (granting a preliminary injunction after a corporation had been able to engage in unfair and illegal employment practices for eight years after it was discovered). Thus, an injunction is appropriate here because the current status quo – GBZ selling illegal defeat devices – needs to be altered to avoid any additional excess emissions of air pollution and prevent harm to human health and the environment.

GBZ has failed to establish that it would suffer irreparable harm if a preliminary injunction would be granted aside from financial harm. "[I]t is well

settled that economic loss does not in and of itself, constitute irreparable harm. Financial injury is only irreparable where no adequate compensatory or other corrective relief will be available at a later date, in the ordinary course of litigation." *Mexichem Specialty Resins, Inc. v. EPA*, 787 F.3d 544, 555 (D.C. Cir. 2015) (internal quotations and citations omitted). It is also well established that compliance costs, such as adhering to the CAA, do not typically constitute irreparable harm for purposes of considering a preliminary injunction. *See e.g.*, *Freedom Holdings, Inc. v. Spitzer*, 408 F.3d 112, 115 (2d Cir. 2005); *see also Am. Hosp. Ass'n v. Harris*, 625 F.2d 1328, 1331 (7th Cir. 1980) (costs of compliance with a regulatory scheme do not constitute irreparable injury). Remarkably, GBZ speculates that an injunction would be harmful to the government because it would likely prevent GBZ from being able to repay its Paycheck Protection Program Loan. ECF No. 42 at 19. This argument is frivolous and irrelevant. The United States cannot and would not knowingly encourage the continuation of illegal business activities regardless of any loan the defendant might have been awarded.

Essentially, GBZ argues that its financial loss outweighs lung disease, heart attacks, childhood asthma, increased cancer risks, heart disease, and other respiratory problems, but fails to support this assertion. ECF No. 42 at 19. The Ninth Circuit has affirmed that "environmental injury, by its nature, can seldom be adequately remedied by money damages and is often permanent or at least of long duration, i.e. irreparable." *League of Wilderness Defs./Blue Mountains*

Biodiversity Project v. Connaughton, 752 F.3d 755, 764 (9th Cir. 2014) (internal quotations and citations omitted); *see also High Sierra Hikers Ass'n v. Blackwell*, 390 F.3d 630, 642 (9th 2004); *Souza v. Cal. Dep't of Transp.*, 2014 WL 1760346, at *7 (N.D. Cal. May 2, 2014) (same).

Finally, GBZ completely ignores that Congress has clearly spoken on this issue. Public interest can be defined by the explicit policies and objectives of the CAA, which supports an injunction to enforce compliance with the CAA. *State of Cal. ex rel. Van De Kamp v. Tahoe Reg'l Planning Agency*, 766 F.2d 1319, 1324 (9th Cir. 1985). Congress' indicated purpose in enacting the CAA and Section 203 to prohibit the manufacture and sale of defeat devices and tampering with a vehicle's emission controls is in itself a declaration of public interest. In doing so, Congress concluded that the benefits of emission controls on motor vehicles to reduce air pollution outweighs the monetary concerns GBZ raises. Therefore, the public interest of protecting the air quality to promote a healthy population is furthered by enjoining GBZ's illegal sale of defeat devices that undermine these objectives.

CONCLUSION

For the reasons set forth herein and in the initial Memorandum and Motion for Preliminary Injunction, the United States respectfully requests that this Court grant the Motion for Preliminary Injunction.

Dated: October 13, 2020 Respectfully submitted,

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